that the Judge did not disagree with the opinions of both the Assessors.

The Court of Appeal cannot imply that when a trial Judge states he does not disagree with the opinions of the Assessors that such statement is equivalent to a positive assertion that he did agree with such opinion.

Accordingly we have no option but to allow this appeal and direct that there shall be a new trial with the aid of fresh Assessors as provided by sub-section (ii) of section 198 of the Criminal Procedure Code.

Retrial Ordered.

JUBRI BIN HAJI SALLEH v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J. Malayan Union, Murray Aynsley, C.J. Singapore and Brown, J.) April 3, 1947]

Evidence Enactement, Sections 25 and 27—Criminal Procedure (F.M.S.), Sections 11, 13, 14, 15, 23 and 25—A Penghulu is not ordinarily a police officer within the meaning of Section 25 of the Evidence Enactment.

In this case the appellant was convicted of murder and sentenced to death. The case for the prosecution rested entirely on a confession made by the appellant to the Penghulu of the mukim in which he resided. At the trial it was submitted that the Penghulu was a Police officer and therefore that the confession was inadmissible in evidence on account of Section 25 of the Evidence Enactment. The learned trial Judge ruled against this submission and admitted the confession in evidence.

Held, (1) that where a penghulu possesses no more powers than are conferred upon him by the Criminal Procedure Code, as in this case, he cannot be regarded as a Police officer, and Section 25 of the Evidence Enactment does not apply.

(2) that although the penghulu was a person in authority, there was no evidence to show that any inducement, threat or promise was made and therefore the confession was rightly admitted in evidence.

Cases referred to :—

(1) *Rasiah v. Public Prosecutor* (1931-2) F.M.S.L.R. 45.

(2) *Nanoo v. Emperor* I.L.R. 51 Bombay 78.

CRIMINAL APPEAL.

J. L. R. Pillai for Appellant.

McCall for the Public Prosecutor.

The judgment of the Court of Appeal was delivered by :

Willan, C. J. :—In this case the appellant was convicted in the State of Johore of murder and sentenced to death.

The appellant, a Javanese, lived in a kampong near Batu Pahat on his own small holding of land cultivated with rubber. The case for the prosecution rested entirely on a confession made by the appellant to the Penghulu of the mukim in which the appellant resided.

At the trial this Penghulu produced his letter of appointment as a penghulu, which was in the Malay language. An examination of it revealed that it contains a Malay version of sections 11, 13, 14, 15, 23 and 25 of the Federated Malay States Criminal Procedure Code, which, by section 75 of the Johore Courts Enactment (Cap. 54) and the Schedule thereto, is law in the State of Johore. As far as penghulus are concerned the provisions of those sections are as follows :—

Section 11: Any member of the public is bound to assist a penghulu if such penghulu demands his aid in the taking, or preventing the escape, of any person whom such penghulu is authorised to arrest.

Section 13: Any member of the public is bound to give information to the nearest penghulu if such member is aware of :—

(a) The commission of certain specified offences, or

(b) The intention of any person to commit any of those specified offences, or

(c) Any sudden or unnatural death or death by violence or any death under suspicious circumstances or the body of any person being found without its being known how such person came by death.

Section 14: Every penghulu shall communicate to the nearest Magistrate or police officer not below the rank of Inspector any information which such penghulu has or obtains respecting :—

(a) The occurrence of any sudden or unnatural death under suspicious circumstances, or

(b) The finding of the dead body of any person without its being known how such person came by his death.

Section 15: The way in which an arrest shall be effected.

Section 23: When a penghulu may arrest without a warrant.

Section 25: A penghulu making an arrest without a warrant shall make over the person so arrested to a police officer without delay.

At the trial it was submitted that since this Penghulu had the above-mentioned powers conferred upon him by his letter of appointment he was a police officer and therefore this confession was inadmissible in evidence on account of section 25 of the Evidence Enactment. That section is as follows :—

> No confession made to a police officer who is below the rank of Inspector by a person accused of any offence shall be proved against such person.

The learned trial Judge ruled against that submission, and admitted the confession in evidence.

The main ground of appeal before us was that the learned trial Judge was wrong because the confession was made to this Penghulu in his capacity as a police officer and therefore inadmissible.

Although there must have been other instances in Malaya of confessions having been made to penghulus there is no reported case in the local law reports.

Counsel for the appellant relied on the statement in Woodroffe's Law of Evidence, 9th edition, page 287, which is contained in the commentary to section 25 of the Indian Evidence Act. That statement is as follows :—

> The provisions of this section apply to every police officer and are not restricted to officers of the regular police force. The following persons are 'Police Officers' within the meaning of this section: police patel, daroga, sub-inspector of a thannah, police sub-inspector, police-constable, police head-constable, chowkidar and the like.

Our attention was also directed to section 8 of the Johore Police Force Enactment (Cap. 32) whereby His Highness the Sultan of Johore may invest any penghulu with the powers of a police officer. That section reads as follows :—

> It shall be lawful for His Highness the Sultan, by notification in the Gazette, to invest any person acting as a penghulu with the powers of a police officer or constable under this Enactment; and every penghulu so invested shall be subject to the several provisions of this Enactment relating to the duties of peace officers.

Crown Counsel cited to us the case of *Rasiah v. P. P.*[1]. In that case a Magistrate convicted solely on a confessional statement made to a Customs Officer. On appeal from that conviction it was submitted that the confessional statement should have been excluded under section 25 of the Evidence Enactment. In deciding against that submission Burton J. held :—

> I hold that in section 25 the words Police Officer should be confined to its natural meaning. It would I think be difficult to give it any other meaning in view of the divergence of our section from the Indian and especially the addition of the words 'who is below the rank of Inspector'. These words are totally inapplicable to Customs Officers.

In our case reference to this Penghulu's letter of appointment is unnecessary because it merely contains a Malay translation of of sections 11, 13, 14, 15, 23 and 25 of the Criminal Procedure Code. It is that Code, not the letter of appointment, which for example gives this Penghulu his power of arrest. Therefore we need only consider the provisions of those sections without recourse to the letter of appointment. It is clear from an examination of those sections that the material power given thereby to penghulus is the power of arrest contained in section 23. That section vests in a penghuhlu the same power of arrest without warrant as is vested in a police officer. But a penghulu, unlike a police officer, does not possess any powers of detention because, by section 25, when a penghulu makes an arrest without a warrant he shall hand over the person arrested, without unnecessary delay, to the nearest police officer, and that police officer shall thereupon re-arrest the person handed over. Further, the Criminal Procedure Code does not confer any powers of search or investigation upon penghulus such as are conferred upon police officers.

Accordingly, where a penghulu possesses no more powers than are conferred upon him by the Criminal Procedure Code, as in this case, he cannot be regarded as a police officer, and section 25 of the Evidence Enactment does not apply.

If, however, which is not so in this case, a penghulu in Johore has vested in him by section 8 of the Johore Police Force Enactment (Cap. 32) substantially the same powers as those possessed by a police officer, such penghulu should be considered as a police officer for the purpose of section 25 of the Evidence Enactment. To use the words of Marten C. J. in *Nanoo v. Emperor*[2] "substantially, therefore, to all intents and purposes we get here a person exercising all the material powers of a police officer".

It was further submitted to us that even if section 25 of the Evidence Enactment does not apply, the confession was inadmissible because it was made to a person in authority, the Penghulu, and it was not made voluntarily. We agree that so far as this particular appellant is concerned the penghulu is a person in authority, but we can find no evidence to show that any inducement, threat or promise was made.

Accordingly this confession was rightly admitted in evidence.

A further ground of appeal was that evidence was led by the prosecution which was not admissible under section 27 of the Evidence Enactment. That evidence was to the effect that the appellant pointed out a place to a police officer as the place where he, the appellant, said he had committed the murder. After this evidence had been given, counsel for the appellant objected and

submitted that a fair trial had been prejudiced because the Assessors had heard this inadmissible evidence damaging to the appellant. The learned trial Judge ruled that this evidence was inadmissible, and instructed the Assessors "to expunge the words from their minds and not to take them into account when considering their verdict".

Counsel for the appellant submitted to us that it was impossible for the Assessors to efface entirely from their minds the effect of their inadmissible evidence, and therefore the learned trial Judge should have stopped the case and ordered a new trial.

After careful consideration we have come to the conclusion that if the evidence in this case had been less strong against the appellant he would have ordered a new trial. Since, however, the appellant was convicted on his own confession, the Assessors could have come to no other conclusion than that to which they came even if the evidence to which reference has just been made had not been led by the prosecution.

Accordingly the appeal of the appellant is dismissed.

Appeal Dismissed.

MANIKAM AND ANOTHER v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J.) April 11, 1947]

Criminal Procedure Code (F.M.S.) Section 170—Joint trial held to be wrong where offences are not committed in same transaction.

In this case the two accused were tried jointly on charges of criminal trespass, but the charges alleged that the first accused committed criminal trespass on one day and the second accused committed the same offence on a different day.

Held, that as the offences were not committed in the same transaction, there should have been a separate trial of each accused.

MAGISTRATE'S APPEAL.

Ramani for appellants.

Griffith Jones for the Public Prosecutor.

Willan, C. J. :—In this case both the appellants were convicted by the Magistrate at Klang, of the offence of criminal trespass punishable under section 447 of the Penal Code, and each of them was sentenced to one month's rigorous imprisonment.

By section 170 of the Criminal Procedure Code persons may be charged jointly and tried together for the same offence or for different offences if such offence or offences are committed in the same transaction.

It is clear from a perusal of the two charges in this case that they do not arise out of the same transaction, because they allege that the first appellant committed criminal trespass on one day and that the second appellant committed the same offence on a different day.

There should have been a separate trial of each appellant. Since a joint trial was held, there has been a contravention of section 170 of the Criminal Procedure Code, and on that account I allow their appeals and quash the convictions and sentences. I order that each of the appellants be re-tried before another Magistrate.

Retrial Ordered.

YAP SOW KEONG AND ANOTHER vs. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J. Malayan Union, Murray Aynsley, C.J. Singapore and Bostock Hill, J.) March 27, 1947]

Evidence—Retracted Confession—Confession made by accused when in Police Custody—Request of accused to call a witness—Criminal Procedure Code, Section 144 (iv)—Courts Enactment (Cap. 25), Section 43.

In this case both the appellants appealed against their conviction on the offence of armed robbery contrary to Section 392 and 397 of the Penal Code. The sole evidence against the first appellant was a confession made by him to a Magistrate which he subsequently retracted at the trial, alleging that he had made the confession because he had been beaten by a Detective whilst in police custody. At the trial, the second appellant stated that he wished to call a witness whose name and address he gave. He had not given the name of this witness at the prelimnary enquiry, nor to the officer in charge of the prison for transmission to the Registrar, Supreme Court, as provided by Section 144 (iv) of the Criminal Procedure Code. The learned trial Judge refused this application.

Held, (1) that an accused can be convicted on his own confession even when it is retracted, if the Court is satisfied of its truth and it is not necessary that there should be corroborative evidence to support it;

(2) that when a person has been in police custody and the only evidence tendered against him at the trial is a confession, which is retracted, it is the duty of the Court to enquire into the matter with great care and satisfy itself that the confession has not been made by any inducement, threat or promise made by the Police, and that as this precaution had been taken by the learned trial Judge in this case the appeal of the first appellant must be dismissed;

(3) that, in this case, the learned trial Judge should have granted the request of the second appellant to call the witness, as he had given his name and an address within thirteen miles of the Court, even though the second appellant had not given the name of the witness at the preliminary enquiry nor to the officer in charge of the prison for transmission to the Registrar, Supreme Court, as provided by Section 144 (iv) of the Criminal Procedure Code.

CRIMINAL APPEAL.

Appellants in person.

Grattan-Bellew for Public Prosecutor.

The judgment of the Court of Appeal was given by :—